PREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 635

IRVING D. FRIEDMAN and SYLVIA FRIEDMAN, on behalf of themselves and in a representative capacity on behalf of all other owners and/or holders of Baltimore and Ohio convertible 4½% income bonds due February 1st, 2010,

Petitioners,

—versus—

CHESAPEAKE AND OHIO RAILWAY COMPANY

and

BALTIMORE AND OHIO RAILROAD COMPANY,

Respondents.

RESPONDENT CHESAPEAKE AND OHIO RAILWAY COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONDENT CHESAPEAKE AND OHIO RAILWAY COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Chesapeake and Ohio Railway Company [1] opposes the granting of the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit on the ground that the Petition shows none of the reasons specified in Rule 19 of this Court and shows no other special, important or extraordinary grounds for this Court's exercise of its discretionary certiorari jurisdiction.

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[1] called C&O herein. The Baltimore and Ohio Railroad Company is called B&O herein.

OPINIONS BELOW

On December 8, 1966 the United States District Court (S. D. N. Y.) granted summary judgment dismissing the complaint in this action on the grounds that

(1) Suit by holders of B&O income bonds to recover principal and interest on their bonds prior to their maturity is barred by the bond indenture clause which provides that suit can be brought by bondholders only in the event that the trustee failed to act after being requested to do so by holders of 25% of the principal amount of bonds outstanding, and that no such request had been made; and

(2) "Plaintiffs' claim of a 'merger in fact' [of B&O and C&O] borders on the frivolous for it is predicated on semantics. . . . the ICC has approved the very transaction and acts [pooling of equipment and use of joint facilities and common officers] which form the basis of plaintiffs' claim"; and

(3) "Moreover, railroads may not merge [49 U. S. C. §§5(2)(a), 5(4)], nor may one railroad assume the obligations of another without ICC approval [49 U. S. C. §20a(2)]".

The District Court also denied plaintiffs' motion for leave to amend its complaint to assert three additional alternative claims (all based on the assertion of a "merger in fact", *i. e.*, without ICC approval) on the ground that all three claims "are unique, if not specious", and also that the requisites for any action by plaintiffs under §20a(11) and §8 of the Interstate Commerce Act have not been met as specified by 49 U. S. C. A. §20a(2).

The opinion (Honorable Lloyd F. MacMahon) is reported in 261 F. Supp. at p. 728 (S. D. N. Y. 1966).

On June 4, 1968 the Court of Appeals (Second Circuit) in a *per curiam* opinion affirmed both the dismissal of

the complaint and the denial of the motion, restating ground (1) above and saying as to grounds (2) and (3):

> "Second, there is no issue of fact as to a merger. The ICC's approval of the use of joint facilities was not approval of a merger as prescribed by law, 49 U. S. C. A. §5(2)(a), (4), or of the assumption by C&O of B&O's obligations. 49 U. S. C. A. §20a(2)."

The Court of Appeals added:

> "In addition, appellants have conceded that on May 1, 1968 all accumulated interest from 1961 to 1967 inclusive was paid, thus removing any factual foundation for the first cause of action and rendering their claims to such interest moot".

The opinion of the Court of Appeals is reported in 395 F. 2d at p. 663.

JURISDICTION

Petitioners ask certiorari to review a *per curiam* decision of the Court of Appeals which affirmed the District Court's dismissal of the complaint and its denial of their motion for leave to amend the complaint to assert three specified additional alternative claims.

THE QUESTIONS PRESENTED

In our view, the Petition does not present any "special and important" question or indeed any question of substance. The questions presented below were:

1. Where holders of unmatured B&O income bonds seek to bring an action based on the indenture securing their bonds (to accelerate the maturity of the principal of all the bonds), must the provisions of the bond indenture be complied with?

2. Does an action lie for judicial declaration of a "merger in fact" between the C&O and B&O railroads, and judicial declaration that C&O consequently has assumed the bonded debt of the B&O, where

(a) the ICC has authorized the C&O to acquire control of B&O by acquisition of the latter's stock (under 49 U. S. C. §5(2) (a) and (b)) [2]; and

(b) the ICC, under its "exclusive and plenary" powers in the field of railroad combinations (49 U. S. C. §5(11)), has not approved a merger of the two roads nor has application therefor been made; and

(c) the ICC has not authorized the assumption by C&O of any of B&O's fixed charges (under 49 U. S. C. §5(2) (e)), nor made the specific finding as to the public interest which said section makes prerequisite to ICC approval of any such assumption; and

(d) the ICC has affirmatively found that the C&O's acquisition of control of B&O, through acquisition of the latter's stock, will not result in the assumption by C&O of B&O's fixed charges; and

(e) the factual bases [pooling of equipment and use by the two roads of joint facilities and common officers] upon which petitioners assert their "merger in fact" theory have been specifically approved by the ICC in its approval of C&O's acquisition of control of the B&O?

The Courts below answered the first of these questions in the affirmative and the second in the negative. The essential holdings of these Courts are outlined under "Opinions Below", *supra*, pp. 2-3. See also "Factual Statement of the Case", *infra*, pp. 5-15.

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[2] *Chesapeake & O. Ry Co. — Control — Baltimore & O. R. Co.*, 317 ICC 261 (1962). The pertinent specific ICC findings referred to in this question are set forth at pp. 12-15 *infra*.

THE STATUTES INVOLVED

Interstate Commerce Act

49 U. S. C. §5(2), (a), (b), (c) and (e); §5(4). These statutory provisions are set forth at pages 17a through 20a of Appendix D to the Petition.

49 U. S. C. §5(11). This statutory provision is set forth on pages 22a and 23a of Appendix D to the Petition.

49 U. S. C. §§8, 20a(2) and 20a(11). These statutory provisions are set forth at pages 24a through 27a of Appendix D to the Petition.

Judicial Code

28 U. S. C. §§2321, 2322, 2323, 2324, 2325, §2284(1), (2), and §1253.

The pertinent texts of these statutory provisions are set forth in Appendix A to this brief.

FACTUAL STATEMENT OF THE CASE

Respondent C&O does not accept petitioner's statement of the case because it contains inaccuracies and argumentative and conclusory matter, and omits essential undisputed facts. Accordingly, the C&O makes this strictly factual statement of the case:

Petitioners own $200,000 face value of B&O 4½% cumulative convertible income bonds due February 1st, 2010 (herein called the "Bonds"), of which there were outstanding $22,000,000 in principal amount as of the date of the complaint, April 20, 1966. (complaint par. 5, p. 29a of App. E to Petition).

These Bonds were issued by the B&O in 1946 under a Supplemental Indenture dated March 14, 1946 (herein called the "Indenture") under which The Chase Manhattan Bank is the Indenture Trustee. (undisputed, p. 2 of af-

fidavit of Frederick W. Doolittle, Jr. in support of cross-motion for summary judgment.)

Petitioners now bring this action for themselves individually and purportedly as a class action on behalf of all holders of Bonds, asking the Court to declare the maturity of the Bonds to be accelerated and the principal and interest of all Bonds to be immediately due and payable. Concededly, on May 1, 1968 the B&O paid all accumulated interest on all outstanding Bonds.

The Allegations Basic to All Causes of Action

All four of the causes of action in the original complaint, and all three of the proposed additional alternative causes of action sought to be asserted by motion for leave to file a supplemental complaint, are grounded on the following three basic allegations:

(1) "That commencing prior to January 1st, 1966, the defendants C&O and B&O affected [sic] a merger in fact with each other by committing the following acts and . . . course of conduct:

"(a) By combining" specified departments of each road "under one executive head for each department";

(b) By representing [in the 1965 combined annual report of the two roads] that ". . . C&O-B&O is a partnership, the best brains and talents of both railroads have been welded into a new organization through management and department coordinations";

(c) by "filing consolidated tax returns, publishing consolidated financial statements and consolidated shareholders annual reports";

(d) "By the C&O owning at least a 90% stock equity in the B&O";

(e) "By the C&O-B&O conducting their respective railroad business as a single network and enterprise";

(f) By other unspecified "acts and courses of conduct"; and

(2) "That by reason of the aforesaid merger in fact, the obligations of the B&O under the terms of the Indenture and Bonds have become the obligations of the C&O as well"; and

(3) That demand has been made upon both defendants to make payment of the arrears of interest and on the Indenture Trustee "to take appropriate action in the premises by reason of the failure of said defendants to make said payments of interest and said demand has been refused" (complaint pars. 9, 10, 11, 12, and 13, pp. 29a-31a of App. E to the Petition, repeated and realleged in all other causes and proposed causes of action).

Additional Allegations of the Complaint

I. *First Cause of Action*

In its first cause of action, the complaint further alleges that defendant C&O in 1966 declared and paid a dividend on its common stock; that this declaration and payment of dividend by the C&O on its own stock while accumulated interest on the B&O Bonds was unpaid, "is contrary to law and a subversion of plaintiffs' rights under the Indenture and their bonds," by reason of the C&O's asserted "merger in fact" with B&O, and makes the arrearages of interest on the B&O bonds immediately due and payable (complaint pars. 14, 15, 16 and 17, p. 31a of App. E to the Petition).

II. *Second Cause of Action*

The second cause of action restates the first, alleging additionally that "said declaration and payment of dividend [by C&O to C&O stockholders] accelerates the maturity and payable dates of the principal . . . of said [B&O] bonds, making same immediately due and payable" (complaint pars. 18, 19 and 20, p. 32a of App. E to the Petition).

III. *Third Cause of Action*

The third cause of action alleges that the maturity of the Bonds is accelerated because "the merged defendants" did not make payments into the sinking fund provided in the B&O Bond Indenture. It predicates this on the combined fixed charges of the B&O and C&O and the alleged declaration and payment by "the merged defendants" of $81,000,000 in dividends in 1964, 1965 and to the date of the complaint in 1966. (complaint pars. 21 through 27, pp. 32a-33a of App. E to the Petition).

IV. *Fourth Cause of Action*

The fourth cause of action alleges that in the years 1964 and 1965, "the defendant B&O of the merged C&O-B&O deposited $10,000,000 to fund its retirement annuity plans", and that therefore all of the Bonds have matured both as to principal and interest. (complaint pars. 28 through 32, pp. 33a-34a of App. E to the Petition).

The Proposed Three Alternative Additional Causes of Action

In August 1966 plaintiffs moved for leave to file a supplemental complaint to assert three additional alternative causes of action. All three of these causes are based on a reallegation of the basic allegations of the original complaint above. The District Court described them as follows:

> "All are predicated on the hypothesis that plaintiffs prove upon a trial that there has been a merger in

> fact, which as a matter of law effected an assumption of B&O's bond obligations by C&O, but that plaintiffs failed to recover on their original complaint because such an assumption is unlawful and void since it was not authorized by the I. C. C. Thus, the first claim seeks to visit liability upon the directors, etc. . . . on the theory that the directors, etc., are jointly and severally liable with the carriers for principal and interest on the bonds under §20a(11) of the Interstate Commerce Act for causing a merger in fact which effected a void assumption of B&O's bond obligations by C&O because it was not authorized by the I. C. C. as required by 49 U. S. C. A. §20a(2). The proposed second and third alternative claims seek the same recovery plus counsel fees from B&O and C&O under 49 U. S. C. A. §8 for a violation of the Interstate Commerce Act by reason of C&O's assumption of B&O's bond obligations via the merger in fact without obtaining formal approval of the I. C. C., as required by 49 U. S. C. A. §20a(2)." 261 F. Supp. 728 at 733.

Additionally, each of these alternative claims asserts that the fact that the defendant individuals and railroads failed to apply to the ICC "for an order authorizing C&O to assume the bond obligations of B&O" is "in violation of the duty imposed on them by law to so do". (Proposed supplemental complaint at pp. 35a-39a of App. E to the Petition). Petitioners have not illuminated us or the Courts as to where any such duty is prescribed.

The Affirmative Defenses

The complaint was dismissed on cross-motion based on the second affirmative defense set forth in both the C&O's and the B&O's answers. Each railroad asserted two affirmative defenses: (1) the ICC has not approved or authorized any merger of the C&O and B&O or any assumption by

C&O of any fixed charges of the B&O, as preemptively required by the Interstate Commerce Act for merger or assumption of fixed charges by railroads, and (2) the action is barred by the "no action" clause of the Indenture and the failure of compliance therewith.

The texts of these affirmative defenses are set forth in Appendix B to this brief. The facts alleged therein are not disputed.

Pertinent Provisions of the Bonds, Coupons and Indenture

The Bonds provide that B&O shall pay interest "subject to the terms of the Indenture" and

> ". . . only if and to the extent that the amounts applicable thereto under the provisions of the Indenture are sufficient to make such interest payment . . ." (p. 24 of Ex. A to affidavit of Frederick W. Doolittle, Jr.)

The interest coupon attached to the Bond states that B&O shall only be required to pay

> ". . . such amount, if any, as may be payable on said date as contingent interest . . . under the provisions of the Indenture referred to in said Bond". (*idem* p. 29)

The Bonds specifically provide:

> "Reference is hereby made to the Indenture for a statement of the rights of the holders of the Bonds and coupons thereunder and the rights, duties and immunities thereunder of the Trustee." (p. 12 of Doolittle affidavit, p. 25 of Ex. A thereto).

Section 7 of Article Eight of the Indenture provides that all rights of action on the bonds are vested exclusively

in the Indenture Trustee and that no holder of any of the bonds shall have any right to institute any action at law or in equity on the Bonds or for enforcement of the Indenture unless and until the Indenture Trustee shall have refused or neglected to institute proceedings after request of the holders of 25% in principal amount of the outstanding Bonds filed with the Trustee with offer of indemnity satisfactory to the Trustee, except only (i) at the stated maturity of the bonds, i. e., February 1, 2010, and (ii) to enforce the right of conversion of the bonds into B&O common stock as provided in the Indenture (pp. 83-84 of Ex. A to Doolittle affidavit, also set forth at pp. B1-B3 of App. B hereto).

The Failure of Compliance With the "No Action" Clause of the Indenture and Petitioner's Familiarity With the Indenture

At no time have the holders of 25% in principal amount of the Bonds outstanding under the Indenture requested the Indenture Trustee to bring an action or institute a proceeding upon any of the matters set forth in the complaint, nor have they offered to the Indenture Trustee indemnity as provided in §7 of Article Eight of the Indenture.

No demand by the holders of 25% of the Bonds is alleged, and the foregoing affirmatively appears in the record by the affidavit of John L. Howard, Corporate Trust Officer of the Indenture Trustee.

Irving D. Friedman, one of the petitioners, in a letter to the B&O president on November 28, 1956 stated that he owned a "substantial amount" of the bonds and "I have read the Indenture securing the bonds . . ." (Ex. C to Doolittle affidavit).

The ICC's Authorization of C&O to Acquire Control of B&O Through Acquisition of B&O Stock, and the Basic Reasons Therefor

On December 17, 1962 the Interstate Commerce Commission filed a report and thereafter entered an order under 49 U. S. C. §5(2), approving and authorizing the C&O's acquisition of control of the B&O through acquisition of the latter's capital stock. *Chesapeake & O. Ry. Co.-Control-Baltimore & O. R. Co.,* 317 ICC 261.

The Commission's reasons for granting the C&O's application for such approval and authorization appear essentially in these findings:

> "The record clearly reflects the complete inability of B&O by itself to improve its financial position. Its current liabilities exceeded its current assets by $24.4 million at the beginning of 1962. Any earnings which B&O may generate in the next few years will be consumed by its urgent requirements for improvements and maintenance expenditures and for servicing its long-term debt. It has practically no unencumbered assets to offer as security for long-term loans. In 1961, B&O's operations produced the largest net loss in the carrier's history . . . Its present precarious financial condition has been accumulating over the years and is not a condition that suddenly occurred." (*idem,* 279).

and that

> "The record establishes that B&O's properties are in poor physical condition. It has considerable deferred maintenance, and a large percentage of its freight cars is either obsolete or in need of repair. Its serviceable freight cars are in short supply and its motive power equipment is inadequate. B&O's properties need to be rehabilitated

> in order that its operating expenses can be reduced and its earnings increased. Unless major improvements of B&O's properties are undertaken immediately, its ability to compete with other railroads and other modes of transportation will be seriously jeopardized. All temporary expedients to effect economies and promote efficiency appear to have been exhausted. Its failure to survive would deal a heavy blow to the shipping public . . . It must have the infusion of new credit from outside. Under affiliation C&O is willing and can provide the financial assistance needed to restore the B&O's properties to essential standards. This is not a temporary palliative but an effort of the railroads themselves to work out their long-range problems" (*idem,* 290-291).

The ICC's Specific Findings Pertinent to the Basic Allegations of the Complaint and of the Proposed Supplemental Complaint

(A) *The Commission's Approval of Pooling of Equipment and the Use of Joint Facilities and Officers*

The Commission reviewed the "specific coordinations proposed" by C&O, and its 5-year program of aid to B&O in building, rehabilitating and improving B&O's equipment and properties (*idem,* 275), and, pertinently to the basic allegations of the complaint herein, found that

> "Operating expenses will be reduced by the coordination of duplicate facilities, the consolidation of offices, and the pooling of equipment with C&O . . . By the elimination of unnecessary expenses, B&O's capacity to increase its earnings will be greatly enhanced" (*idem,* 279).

and that

> "Through the use of joint facilities and personnel and the pooling of equipment, substantial cost reductions and savings can be effected. Further, the legitimate interests of B&O's creditors and equity holders will be served by C&O control. As a result of the affiliation, B&O will eventually become a stronger railroad and the efficiency and economy of its operations will be increased. Strengthened as a result of the control, B&O's ability to meet adequately the needs of commerce and of the national defense will be enhanced." (*idem*, 291) [3]

This Court may take judicial notice of the fact that, subsequent to its 1962 "control" decision, the ICC has made orders specifically approving 57 joint officers of the two roads including a joint president.[4]

(B) ***The Commission's Envisaging the Filing of Consolidated Income Tax Returns***

The Commission found:

> "Annual savings from consolidations to be effected by C&O and B&O in five specific areas . . . were estimated on two different bases, depending on whether the carriers could file consolidated income

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[3] It is of interest to note that in a recent case U. S. District Judge Inzer Wyatt found that as of January 15, 1965, the C&O "had invested in equipment for B&O, or had arranged financing for equipment for B&O, to the extent of $194,500,000. This is of course separate from its investment in stocks and bonds of B&O, which at that time stood at $117,700,000." *Schleiff* v. *Chesapeake & Ohio Ry. Co.*, 43 F.R.D. 175 (S.D.N.Y., 1967) at 180.

[4] In the *Schleiff* case cited in the previous footnote, Judge Wyatt found "After the ICC approved control of B&O by C&O, it also approved of many persons being at the same time officers or directors or both of the two roads." 43 F.R.D. 175 at 177.

tax returns . . . On the basis of consolidated tax returns, the coordinations would result in estimated annual savings during the first 5 years of $13,580,973." (*idem,* 275).

(C) *The Commission's Finding of No Merger*

The Commission found:

"The application here concerns only the control of the B&O by the C&O, although the carriers express an intent to merge at some time in the future . . .

"It is clear that we cannot require the carriers to merge, either directly or indirectly by appending a condition, such as sought here, to an approval of the control transaction. In any event, it has not been shown that such a condition is required to make the transaction consistent with the public interest." (*idem,* 290).

(D) *The Commission's Finding of No Assumption by C&O of B&O's Fixed Charges*

The Commission found:

"The proposed acquisition of B&O stock will not result in an increase in the total fixed charges of either carrier, or in the assumption of guarantee of fixed charges by either carrier." (*idem,* 292).

(E) *The Commission's Conclusory Finding*

The Commission concluded:

". . . the record warrants the conclusion that the proposed transactions will be beneficial to the public". (*idem,* 293).

THE PETITION FOR CERTIORARI SHOULD BE DENIED

It is respectfully submitted that the petition for certiorari herein presents none of the considerations governing review on certiorari comprehended within the scope of Rule 19 of this Court, and that the Petition should be denied.

Rather than burden this Court with a reargument of the matters argued before the District Court and the Court of Appeals, as to those matters this respondent adopts as its brief in opposition to the granting of the Petition the following:

1. This respondent's factual statement of the case, *supra,* pp. 5-15.
2. The opinion of the District Court below. 261 F. Supp. 728 (outlined at p. 2 *supra,* and set forth verbatim as Appendix B to the Petition).
3. The opinion of the Court of Appeals below. 395 F. 2d 663 (outlined at pp. 2-3 *supra,* and set forth verbatim as Appendix A to the Petition).

REPLY TO POINTS RAISED IN THE PETITION WHICH WERE NOT PRESENTED TO THE COURTS BELOW

1. Petitioners' Challenge of the ICC's "Control" Decision Cannot Be Entertained on Certiorari to a Court of Appeals But Only on an Appeal From a Statutory Court in an Action Against the United States.

In Point I of their argument petitioners assert certain "constitutional formulations" which admittedly they did not present to the Courts below. They attack the "haplessness" of Congress' enactment of the Interstate Commerce

Act as amended and the "almost grotesque short-sightedness and all-around unwisdom of the ICC in administering that legislation" (pp. 14-15). They invoke comments of Commissioner Tucker in his dissent in the "control" decision (pp. 16-17), and they contend that they are "not foreclosed by the ICC's 1962 action" because "that Agency's 1962 C&O-B&O 'control' decision is a very bad and very unwise decision" (p. 18). Then they say that "If it is said that we are foreclosed by the 1962 ICC decision, then we respectfully contend that that decision is a constitutional nullity . . ." (p. 18), and conclude by asking "whether the Federal legislation and the ICC's administrative implementation thereof as applied to the facts of this case . . . should justly and constitutionally prevail . . ." (p. 27).

There could hardly be a plainer attack on an ICC order. 28 U. S. C. §§2321 and 2322 require that all actions "to . . . annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money [etc.] . . . shall be brought by or against the United States". 28 U. S. C. §2325 requires that application to restrain the operation or execution of an ICC order lies only before "a district court of three judges under section 2284 of this title", with appeal as of right to this Court (28 U. S. C. §1253).

U. S. District Judge Frederick van P. Bryan in an opinion which the Court of Appeals (2d Cir.), in affirming it *per curiam*, described as "exhaustive and learned",[5] concisely summarized the law:

> "It is recognized that in the enactment of chapter 157 [the Urgent Deficiencies Act, 28 U. S. C. §2321-2325] Congress was concerned with providing special remedies for the . . . review of ICC orders to insure that the public interest . . . would

[5] *Annenberg* v. *Alleghany Corp.* and *Schwartz* v. *Eaton*, 360 F. 2d 211 (2d Cir.) at 212, *cert. denied*, 385 U. S. 921 (1966).

> be adequately protected. . . . The act has been applied broadly to all cases in which orders of the ICC are under attack, whether directly or indirectly. In a long line of cases it has been consistently held that the Urgent Deficiencies Act is the exclusive method of reviewing the Commission's orders. . . ." [citing an entire column of authorities], *Schwartz* v. *Bowman*, 244 F. Supp. 51 (S. D. N. Y., 1965) at 67.

Since the attacks sought to be made before this Court could not have been entertained before Judge MacMahon (sitting as a single-judge District Court) nor reviewed by a Court of Appeals, this attack may not be entertained by this Court on *certiorari* to a Court of Appeals, but only on an appeal from a decision of a statutory three-judge court convened under the Urgent Deficiencies Act in an action against the United States.[6]

2. None of the Cases Cited by Petitioners in Their Point II Supports Their Argument for Certiorari to "Reexamine" Transportation Policy in This Case.

In their Point II petitioners urge that certiorari be granted "as affording a valuable occasion for reexamining statutory and constitutional questions of prime national importance in transportation policy . . ." (p. 27). In support of this argument they cite six cases. In four of them orders of the Interstate Commerce Commission were attacked, and each of these came to this Court on appeal from statutory three-judge courts convened under the

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[6] Indeed, the District Court below pointed out that (even without the constitutional challenge now made in the Petition), "Although disguised in the semantics of a *de facto* merger, plaintiffs' claim is really a collateral challenge to the ICC's approval of the transaction and acts upon which the complaint is based. 49 U. S. C. A. §5(2) (4) (5) (7)", citing authorities. 261 F. Supp. 728, 732 fn. 8 (1966).

Urgent Deficiencies Act, with the United States a party. These cases are *Alleghany Corporation* v. *Breswick & Co.*, 353 U. S. 151 (1957); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 282 U. S. 311 (1931); *County of Marin* v. *United States*, 356 U. S. 412 (1958); and *Schwabacher* v. *United States*, 334 U. S. 182 (1948).

Neither of the other two lends support to petitioners' argument:

Missouri-Kansas-Texas Railroad Company v. *Mars*, 278 U. S. 258 (1929) came to this Court on writ of error to a decree of the Supreme Court of Texas, under the then §237(a) of the Judicial Code. Plaintiff in error maintained that Article 6422 of the Revised Civil Statutes of Texas "is repugnant to" §20a of the Interstate Commerce Act (*idem*, 259).

This Court held that "clearly §20a relates exclusively to securities" but "does not in any manner relate to liability for, or the payment of, claims specified in Art. 6625. Its field of operation is wholly distinct from that covered by the state enactment", and that "there is no conflict between Art. 6625 and the provisions of §20a of the Interstate Commerce Act" (*idem*, 260-61).

New York, Chicago & St. Louis Railroad Company v. *Frank*, 314 U. S. 360 (1941) came to this Court on direct appeal from a judgment of the Appellate Term of the Supreme Court of the State of New York. The "Nickel Plate" road was organized in 1923 as a consolidated corporation under the laws of New York and four other states. Section 143 of the New York Railroad Law provided that "all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it . . . as if incurred or contracted by it" (*idem* at 361-2).

On an application to the ICC under §20a made shortly after that consolidation, the ICC held that the Commis-

sion's approval under §5 was unnecessary. It found that "the present and future public convenience and necessity require and will require that said lines be acquired and operated by the applicant" and that

> "Applicable State laws afford means to effect the consolidation. . . . Furthermore, in the absence of mandatory provisions of a Federal statute we should give full faith and credit to the acts of sovereign States, especially when, as in this case, their action is unanimous". *Acquisition and Stock Issue by N. Y., C & St. L. RR,* 79 ICC 581 (1923) at 585-6 quoted more extensively by this Court in *Frank,* 314 U. S. at 365-6.

This Court said:

> "We are now asked blindly to unravel we know not what, by reversing a consistent and long standing interpretation of §20a by the administrative body to which its enforcement was committed. . . .
>
> "Under the circumstances of this case, the administrative interpretation on which the Commission has acted in its long course of dealing with Nickel Plate affairs should not be upset". (*idem* at 372-3).

3. Petitioners' Argument That Federal Preemption of State Law Relieves Them From Application of the "No Action" Clause Is Baseless.

In Point III of their argument petitioners present a two-pronged attack on the lower Courts' conclusion that their failure to comply with the "no action" clause of the Indenture was fatal to their suit. Their first line of argument—that because of the alleged "merger in fact" the failure of the trustee to sue on behalf of the bondholders was unreasonable as a matter of law, and the bondholders were relieved from compliance with the "no action" clause—constitutes a collateral attack on an ICC order.

The petitioners' second challenge must also fail for it is based on the unsound hypothesis that if there is *any* facet of Interstate Commerce law involved in a case, State law must be ignored as to *all* facets of the case—even where the federal law is silent. The doctrine of federal preemption is not so sweeping. Petitioners contend that the Courts below based their conclusion solely on State law, completely ignoring "federal statutory and constitutional preemptive considerations" (p. 31). In support of this federal preemption argument, petitioners rely on three decisions, all of which are clearly distinguishable from the instant case:

In *Northern Securities Co.* v. *United States,* 193 U. S. 197 (1904), the Court dealt with the application of the Sherman Antitrust Act to a railroad holding company and in no way touched upon the "exclusive and plenary"[7] authority of the Interstate Commerce Commission. The *Seaboard Air Line R.R.* v. *Daniel,* 333 U. S. 118 (1948) and *New York Central Securities Corp.* v. *United States,* 287 U. S. 12 (1932) decisions involved direct conflicts between specific rights or obligations created by State law and a particular ICC order issued pursuant to relevant Interstate Commerce legislation. The Court held that in such situations the authority of the Interstate Commerce Commission was exclusive and that the ICC order must prevail.

The present situation, however, does not present a conflict between a State-created right or obligation and Interstate Commerce Commission authority. The condition precedent to suit imposed upon Baltimore & Ohio bondholders by the "no action" clause is a contractual duty established in the bond indenture, which was before the Interstate Commerce Commission when it authorized the issuance of the Bonds. *Baltimore & Ohio Railroad Co. Debt Adjustment,* 261 I. C. C. 51 (1945).

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[7] 49 USC §5(11).

Moreover, the assumption that the lower Courts found the laws of the State of New York to be controlling with complete disregard for possible federal considerations is not well founded. The condition precedent imposed on the bondholders was clear on its face and, in the absence of direct federal law requiring a contrary result, the lower Courts looked to the decisional law of New York as authority for long established construction of such a contractual obligation. See, *e.g., De Sylva* v. *Ballentine,* 351 U. S. 570 (1956); *Clearfield Trust Co.* v. *United States,* 318 U. S. 363 (1943); *United States* v. *Maryland Casualty Co.,* 64 F. Supp. 522, 527 (S. D. Calif. 1946).

The Courts below did not restrict their examination to New York decisions in which ICC factors were not present. A very pertinent case, *Quirke* v. *St. Louis-San Francisco Ry. Co.,* 277 F. 2d 705 (8th Cir.), *cert. denied,* 363 U. S. 845 (1960), was cited as support by the District Court [8] in its discussion of the reasonableness of the "no action" clause (261 F. Supp. 728, 731 fn. 7).

In *Quirke,* a suit was brought by the holder of bonds issued by a railroad subject to ICC jurisdiction. The Court of Appeals for the Eighth Circuit, relying on decisions of both the Eighth and Fourth Circuits, found that the bondholder's lack of compliance with the "no action" clause contained in the bond indenture precluded suit, stating:

> "These restrictions place positive limitations on the rights of every bondholder which cannot at his option be ignored. They are both reasonable and salutary * * * [citations] The reasons for the rule are stated by us in Central States Life Ins. Co. v. Koplar Co. supra, as follows [80 F. 2d 758]:

[8] The *Quirke* decision was also discussed extensively in the C&O's memorandum of law to the District Court, at pp. 23-24.

'The reason for the rule is not far to seek. If in a mortgage securing thousands of bonds every holder of a bond or bonds were free to sue at will for himself and for others similarly situated, the resulting harassment and litigation would be not only burdensome but intolerable.' '' *Quirke* v. *St. Louis-San Francisco Ry. Co.*, 277 F. 2d 705, 709 (8th Cir.), *cert. denied*, 363 U. S. 845 (1960).

CONCLUSION

The Petition for Certiorari Should Be Denied.

Respectfully submitted,

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APPENDIX A

Judicial Code

28 U. S. C. §2321 Procedure generally; process:

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter . . .".

28 U. S. C. §2322 United States as party:

"All actions specified in section 2321 of this title shall be brought by or against the United States . . .".

28 U. S. C. §2323 Duties of Attorney General; intervenors:

"The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23 and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

"The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party . . .".

28 U. S. C. §2324 Stay of Commission's order:

"The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Com-

merce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action . . .".

28 U. S. C. §2325 Injunction; three-judge court required:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title . . .".

28 U. S. C. §2284 Three-judge district court; composition; procedure:

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing

shall be given to the governor and attorney general of the State.

"If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

"Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof . . .".

28 U. S. C. §1253 Direct appeals from decisions of three-judge courts:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges . . .".

APPENDIX B

TEXT OF AFFIRMATIVE DEFENSES ASSERTED IN DEFENDANT C&O's ANSWER TO THE COMPLAINT

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

16. The Congress of the United States has preempted the field of railroad and other carrier transportation and the laws in relation thereto through the enactment of the Interstate Commerce Act, as amended from time to time.

17. Both C&O and B&O are carriers subject to the provisions of the Interstate Commerce Act.

18. Pursuant to the Interstate Commerce Act, no carrier may merge with another carrier or assume any obligation or liability in respect of the securities of any other person, including another carrier, without the express authorization and approval of the Interstate Commerce Commission, upon application by the carrier or carriers proposing to merge or to assume any obligation or liability.

19. Neither C&O nor B&O has made application for any such approval or authorization; nor has the Interstate Commerce Commission approved or authorized any merger of the C&O and B&O or any assumption by C&O of any obligation or liability in respect of any securities of B&O.

20. By reason of the aforesaid, the complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

21. On information and belief, Section 7 of Article Eight of the Indenture provides that:

> "SECTION 7. In order to promote and to protect the equal and ratable rights of every holder of the

Bonds, and to avoid multiplicity of suits, it is expressly covenanted and agreed that all the Bonds shall be subject to the condition that all rights of action thereon, or in respect thereof, or on or in respect of the coupons appurtenant to such Bonds, are vested exclusively in the Trustee under this Indenture, and that no holder of any Bond or of any coupon appertaining thereto shall have any right to institute any action at law or in equity upon the Bonds or any of the appurtenant coupons, or growing out of any provision thereof, or of this Indenture, or for the enforcement of this Indenture, unless and until the Trustee shall have refused or neglected to institute proper proceedings within a reasonable time after request of the holders of 25% in principal amount of the Bonds then outstanding, filed with the Trustee, with offer of indemnity satisfactory to the Trustee; and any recovery in any action or proceeding instituted by the holder of any Bond, or by the holder of any appurtenant coupon, shall be for the equal *pro rata* benefit of all outstanding Bonds and coupons similarly situated, and, for the protection and enforcement of this covenant, each and every holder of a Bond and the Trustee shall be entitled to such relief as can be given either at law or in equity, *provided, however,*

(a) nothing in this Article Eight or elsewhere in this Indenture or in the Bonds or in the coupons shall affect or impair the obligation of the Company, which is unconditional and absolute, to pay at the date of stated maturity therein expressed the principal of the Bonds and the appurtenant coupons to the respective holders of the Bonds and coupons at the time and place in the Bonds and

coupons expressed, or affect or impair the right of action, which is also absolute and unconditional, of such holders to enforce such payment; and

(b) the holder of any of the Bonds, without reference to the consent of the Trustee or of the holder of any other Bonds, in his own behalf and for his own benefit, may enforce, and may institute and maintain any suit, action or proceeding suitable to enforce, or otherwise in respect of, his right to convert his Bond, in the manner provided therein or in this Indenture, into common stock of the Company and, in case of call for redemption of his Bond, payment thereof."

22. On information and belief, the holders of 25% in principal amount of the Income Bonds now outstanding have not requested the Successor Trustee under the Indenture to bring an action upon any of the matters set forth in the complaint, nor have they offered to the Successor Trustee satisfactory indemnity under Section 7 of Article Eight of the Indenture.

23. By reason of the aforesaid, neither the plaintiffs nor any other individual holders of the Income Bonds have the right to maintain this action, and the complaint fails to state a claim upon which relief can be granted.